

FILED

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
CENTRAL DIVISION

SEP 26 2005

  
CLERK

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GARY BLACK BEAR,

CIV 05-3009

Petitioner,

-VS-

ORDER AND OPINION DENYING  
CERTIFICATE OF APPEALABILITY

UNITED STATES OF AMERICA,

Respondent.

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TO THE EIGHTH CIRCUIT COURT OF APPEALS:

Petitioner filed a motion to vacate, set aside, or correct his conviction and sentence, contending that he was entitled to relief under the United States Supreme Court's decisions in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), Blakely v. Washington, 124 S.Ct. 2531 (2004), and United States v. Booker, 125 S.Ct. 738 (2005). The motion was filed beyond the one year period of limitations set forth in 28 U.S.C. § 2255. I summarily dismissed the petition upon initial consideration due to procedural default, finding that Apprendi, Blakely, and Booker have not been found to be retroactive on collateral review.

Pursuant to 28 U.S.C. § 2253, a certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right. Petitioner did not and has not made a substantial showing of the denial of a constitutional right.

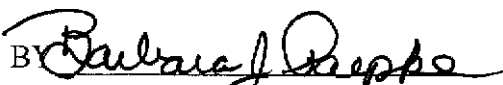
IT IS HEREBY CERTIFIED that there does not exist probable cause of an appealable issue with respect to the Court's order denying petitioner's motion to vacate, set aside or correct his sentence.

Dated this 26th day of September, 2005.

BY THE COURT:

  
CHARLES B. KORNMANN  
United States District Judge

ATTEST  
JOSEPH HAAS, CLERK

BY   
Deputy